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Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-497

STATE OF OKLAHOMA,
Petitioner,

VERSUS

CHEROKEE NATION, CHOCTAW NATION and CHICKASAW NATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS, EASON OIL COMPANY, ET AL., IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI OF STATE OF OKLAHOMA

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The State of Oklahoma has filed a Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit, to review the judgment entered in that court in the above captioned case on June 1, 1972, Nos. 71-1210 and 71-1295, in that court.

CITATIONS TO OPINION BELOW

The United States District Court, Eastern District of Oklahoma, did not write an opinion. The opinion of the United States Court of Appeals, Tenth Circuit, is reported at 461 F.2d 674 (1972). Copies of the decision of the District Court and of the Court of Appeals are shown in the

Appendices of the Petition of the State of Oklahoma. In addition, the Pretrial Order of April 14, 1971, being an integral part of the judgment of the District Court, is shown in Appendix A to this brief.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 1, 1972, and the order denying rehearing was entered on June 27, 1972. Jurisdiction is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

The questions presented by Petitioner are of great importance but an additional vital question is presented by the decision in the courts below:

> If, upon final determination, it is found that the Indian Tribes, and not the State of Oklahoma, are the present owners of the navigable Arkansas River in Oklahoma, have due process requirements under the United States Constitution been met when the State is required *without an evidentiary hearing,* to pay the Indians the funds held by the State in trust for its lessees, thus denying the lessees the enforcement of their contractual rights to such funds without the opportunity to be heard on the question of use of the lands for which such funds were paid?

STATEMENT OF THE CASE

The Statement of the Case by Petitioner is not complete. The following is necessary to a further understanding of the decision.

The Court of Appeals, after rejecting the claim of Oklahoma to ownership, then noted that:

> "The trial court cancelled all leases given by Oklahoma to the river bed, ordered an accounting for all lease rentals, bonuses and royalty payments and the payment of the amount so received by Oklahoma into the court registry and held, that the lessees were not entitled to the return of anything paid to Oklahoma under the leases." (461 F.2d 678).

The Court of Appeals then concluded:

> "In our opinion Oklahoma has no right to retain the lease considerations. The right thereto lies between the lessees and the Indians. The lessees and Oklahoma made a mutual mistake of law. The documents determinative of title were all a matter of public record. We find nothing to suggest that Oklahoma engaged in conduct which misled or prejudiced the lessees. *The trial court found, and we perceive nothing in the record to dispute the finding, that the lessees 'got what they bargained for.'* The court decree protects the lessees against accountability to the Indians for actions taken under the leases. This includes damages for trespass. The lessees are not entitled to this protection plus return of the money which they paid for the leases.*

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* While the lessees are appreciative of the District Court's good intentions, the opportunity of being heard on the question of a taking or a benefit was summarily denied by the District Court.

"Whatever might be the situation if we were concerned only with the respective rights of Oklahoma and its lessees, *we are confronted with the fact that the lessees have had the use of the land and have paid Oklahoma, not the rightful owner, therefor. If the lessees were awarded the return of the lease considerations which they have paid to Oklahoma, they would have received the use of the land for nothing and by the decree would be protected against trespass claims by the real owners. Equity will not condone such a result. The lessees are not entitled to return of the lease considerations.*" (461 F.2d 680). (Emphasis ours.)

ARGUMENT

The intended result of the District Court's decree and the affirmance by the Court of Appeals is to protect the lessees against accountability to the Indians for actions taken under the leases, including damages for trespass.

The Court of Appeals holds that the lessees are not entitled to protection against trespass plus return of the money which they paid for the leases. It further states that it is confronted with the "fact" that the lessees have had the use of the land and have paid Oklahoma, not the rightful owner, therefor; that if the lessees were awarded the return of the lease considerations which they have paid to Oklahoma, *they would have received the use of the land for nothing.* What the court below has failed to consider is that the lessees have *not* received the use of the land. This litigation was instituted by The Cherokee Nation or Tribe of Indians in Oklahoma shortly after the lessees purchased oil and gas leases from the State of Oklahoma. Because of the pendency of this litigation, the lessees were

effectively prevented from making any use of the land covered by the leases. There is no evidence that the lessees have explored, prospected, produced oil, gas or any other minerals, shared in production attributable or allocated to the lands covered by the leases or in any other manner received any benefit for the moneys paid to the State of Oklahoma under the terms of the leases. In short, all that the lessees have done is to pay bonus and delay rentals to the lessor, the State of Oklahoma, which it believed in good faith to be the owner of the land, for the *right of use* which they have not been allowed to exercise.

Further, and more important, *the lessees were denied the right to be heard on the question.*

It is significant that the District Court found that "no oil or gas wells have been drilled on any part of the bed of the navigable portion of the Arkansas River between its high water banks; . . ." but that "*no evidentiary hearing is required* to determine the basis for distributing to the Tribes the money which may be deposited with the registry of this Court in accounting for leasehold payments made and owing; . . ." (Emphasis ours.) (Pretrial Order of April 14, 1971 (incorporated into Judgment of April 14, 1971), Record 204, 205, Appendix A-5.)

Moreover, the judgment is inherently defective with respect to the accounting, for it states:

> "The court is of the opinion that since this order disposes of all issues in the case *(except those that may arise by reason of the accounting herein required)*, . . ." (Petition for Certiorari, Appendix B-3). (Emphasis ours.)

As a result, the District Court made the unwarranted assumption that the lessees had received some benefits under the cancelled leases. The judgment of the District Court follows neither law nor equity.

The court's reasoning is found in the Pretrial Order of April 14, 1971 (Record 206, Appendix A-4):

> "The unwillingness of the Court to cause the purchase price of the leaseholds to be returned is tied to the unwillingness of the Court to permit the Tribes to hold such purchasers for anything taken under the leases up to this point."

The Order considers the following as equitable: The lessees purchased from the State of Oklahoma the right to explore for and produce oil and gas in the areas in question. The State received money for this privilege. Shortly thereafter, the filing of the captioned lawsuit deprived the lessees of their right to explore for and produce oil and gas, in that they could not in good faith go upon land which was the subject of a lawsuit. The District Court held that because of the good faith of the lessees, prior to the suit being filed, that they should not be held liable for what they took from the Indians' land: *nothing*. The court further holds that because they are not held liable for what they took, nothing, they received what they bargained for: *the right to explore for and produce oil and gas*. They should, therefore, not receive their money back. This right is terminated by the judgment, even were it not practically terminated by the filing of the lawsuit. The court then holds that because the State has the money and should not pay it back to the lessees, it should pay it to the Indians. We submit that this is gross inequity rather than equity.

The Commissioners of the Land Office of the State of Oklahoma issued these oil and gas leases under a published policy that if the State did not own the land upon which the leases were given, the bonuses and rentals would be returned to the lessees (Appendix B).

Lessees submit that the money paid to the State of Oklahoma under the contractual right for its return if the State was not the true owner is a contract right protected under Amendment V of the United States Constitution—*Highland* v. *Russell Car & Snowplow Co.*, 279 U.S. 253, 73 L.Ed. 691 (1929).

The failure of the court to permit introduction of evidence that the lessees in fact were prevented from exercising any rights under these leases was a failure to grant due process of law to these respondent lessees and denied them "their day in court."

In *Roberts* v. *New York*, 295 U.S. 264, 278, 79 L.Ed. 1429, 1436, Mr. Justice Cardozo explained the requirements of due process with respect to an erroneous proceeding and concluded that *there* the hearing had been "full and candid" and that failure of due process was "something more far-reaching than one of dubious mistake in the appraisal of the evidence." Here, the error in denying the parties an evidentiary hearing is "gross and obvious, coming close to the boundary of arbitrary action."

The District Court's decision was expressly based upon findings of fact. These findings that the lessees took something from the Indians and that they received some benefit from the leases issued by the State were made without the benefit of any evidence to support the findings. An evi-

dentiary hearing was repeatedly requested[1] of the District Court on this question and refused by the pretrial order issued simultaneously with the judgment. The rights of the lessees cannot be arbitrarily forfeited, for the due process clause protects against an unlawful invasion not only by the legislative branch, but also by the courts. *Continental Illinois National Bank and Trust Co.* v. *Chicago, Rock Island and Pacific RR.*, 294 U.S. 648, 79 L.Ed. 1110 (1935); *Brinkerhoff-Faris Trust and Savings* v. *Hill*, 281 U.S. 673, 74 L.Ed. 1107 (1930).

In the instant case, many titles in and near the entire river were in dispute as a result of movements of the river. In accordance with the written provisions governing leasing by the State, the oil and gas lessees purchased leases from the State allowing them to explore for, and if found, to produce and save oil and gas so long as it was produced in paying quantities, or, if the State did not have title to the leases, the State would return the moneys paid under the lease contracts. Whether the policy letter is enforceable as a separate agreement as in *Brunson, et al.* v. *Commissioners of the Land Office*, 292 Pac. 562 (Okla. 1930),[2] or should be considered as a part of the lease agreement is academic.

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[1] Brief submitted on February 16, 1971, in the U. S. District Court, Headnote IV, page 15. "*An accounting for bonuses, rentals and royalties requires resolution of factual questions through a hearing on the evidence.*" Also see brief submitted to the U. S. District Court on March 15, 1971, Proposition IV, page 7.

[2] That case dealt with leases given by the Commissioners of the Land Office in the south half of the Red River, which was later held by United States Supreme Court to be owned by the United States rather than the State of Oklahoma. As here, the Commissioners had agreed that if the State did not own the land upon which the leases were

See *McKenna* v. *Pan American Oil Corp., et al.*, 200 F.Supp. 468 (E.D. La. 1961); *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970); 15 O.S. 1961, Sec. 163.

> "The Commissioners of the Land Office . . . were vested with the power to enter into said agreements . . . and . . . such contracts were legal and enforceable." *Brunson, et al.* v. *Commissioners of the Land Office.*

Although it was incumbent upon the District Court to retain jurisdiction of the matter to settle the entire controversy of the parties having once taken equitable jurisdiction, it may not depart from recognized legal principles, nor may it create a contract between the parties where none exists. *Hedges, et al.* v. *Dixon County*, 150 U.S. 182, 37 L.Ed. 1044 (1893).

A court of equity has no more right than has a court of law to act on its own notion of what is right in a par-

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[2] (Continued)

given, the bonuses, rentals and forfeitures would be returned to the lessees. The Supreme Court of Oklahoma held:

> "In the case at bar, the State of Oklahoma had no title to the Red River bed and its attempted leasing thereof was null and void. The defendant commissioners received the money herein involved under an agreement to hold it pending the determination of the ownership of said river bed, and to return it if Oklahoma's title failed. To say that the defendants could transfer this money to the State in violation of such agreement and not incur any obligation to pay the same under such circumstances, *is nothing short of saying that the money of the plaintiffs could be taken without due process of law.* After Oklahoma's title failed, it became the duty of the defendant Commissioners to return this money to the plaintiffs." (Emphasis ours.)

The trial court was directed to issue a writ of mandamus commanding the Commissioners to refund the money deposited as bonuses, rentals and forfeitures.

ticular case. *Rees* v. *Watertown,* 19 Wall. 107, 22 L.Ed. 72 (1874); *Wright* v. *Ellison,* 1 Wall, 17 L.Ed. 555 (1864); *Crocket* v. *Lee,* 7 Wheat. 527, 5 L.Ed. 513.

The attempt by the District Court and the Court of Appeals to "balance the equities" between the Indian Tribes and the State and the lessees violates this principle. The District Court says, in its Pretrial Order of April 14, 1971:

> "If the defendant companies and individuals are not to be held accountable for their takings, *if any,* from the bed of the Arkansas prior to resolution of the question of ownership, it follows that they are not entitled to the return of moneys paid to the State of Oklahoma for leasehold or other interest" (Record p. 203, Appendix A-3). (Emphasis ours.)

The District Court and the Court of Appeals preclude the return of moneys by the State of Oklahoma to the defendant companies and individuals regardless of whether or not there has been any taking! Not only does this result in these defendants being deprived of property without due process of law, contrary to the Constitution of the United States, it even violates Chapters 28 and 29 of Magna Charta *(Rees* v. *Watertown).*

CONCLUSION

If the moneys are refunded to the lessees, the Indians have lost nothing (if it be finally determined that they now have title) for they can hold their own lease sale and otherwise make use of the lands for profit.

These respondents do not disagree with the matters raised by the petitioner, State of Oklahoma. But we wish

to emphasize that the Judgment and Pretrial Order of the District Court are inherently defective and the deprival of a hearing on the question of taking and the benefit or use by lessees is a substantive failure of due process of law and an impairment of these lessees' right to moneys which were paid by them for rights which they were not permitted to exercise. Therefore, for these reasons as well as those stated by petitioner, State of Oklahoma, we urge that certiorari be granted.

Respectfully submitted,

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October, 1972

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED
APR 14 1971
CHARLES N. HASKELL
Clerk, U. S. District Court
By ----------
Deputy Clerk

CHEROKEE NATION OR TRIBE OF INDIANS, Plaintiff,	)	
v.	)	NO. 6219
STATE OF OKLAHOMA, et al., Defendants.	)	
CHOCTAW NATION and the CHICKASAW NATION, Intervenors.	)	

PRETRIAL ORDER

On August 19, 1970, following a pretrial conference, the court entered an order determining the issues remaining for disposition in this case. On January 12, 1971, a further order was entered resolving all legal issues raised by the parties except those set out in paragraphs 2, 3 and 7 of the August 19 order. It is the purpose of this order, after a conference with counsel on February 5, 1971, and upon consideration of the briefs submitted to the court, to rule on these issues.

As stated in the order of August 19, 1970, it is the position of the Cherokee Nation that the defendants should be required to account for all moneys paid or due by reason of leases on the portion of the Arkansas river bed here involved for oil, gas and other minerals, or for other pur-

poses, and that when the amounts have been determined the money should be paid into the registry of the court for distribution to the nation or nations entitled to it. The Choctaw and Chickasaw Nations, on the other hand, in their amended answer filed by leave of court, contend that any taking by the defendants from the surface or subsurface of the river bed was wrongful and reimbursement therefor should be made to the extent of the full value. The view of the State of Oklahoma and the other defendants is that if the State of Oklahoma was not the owner of the river bed, its leases to the other defendants were a nullity and any moneys received should be returned.

From a strictly legal view of the problem, the position of the Choctaw and Chickasaw Nations may be correct, at least in part, and anything taken by the defendants was without authority and ought to be returned. Consistent with this view, any money received by the State of Oklahoma from the other defendants ought to be handed back; it was accepted in payment for leaseholds on land the State did not own. But in the opinion of the court practical considerations in the circumstances of this case require sustaining the position of the Cherokees.

The Cherokee Nation and the Choctaw and Chickasaw Nations owned this strip of land (the portion of the bed of the Arkansas River with which we are concerned here) for nearly 140 years without knowing it, or at any rate without asserting such ownership. For almost 63 years the defendants have labored under the impression that this same piece of property belonged to the State of Oklahoma, and there is respectable opinion that this view was not without reasonable grounds. (See Choctaw, et al. v. Oklahoma, 402 F. 2d 739; dissenting views, 397 U.S. 620). During the period the State has claimed ownership the river has changed its bed many times—gradually, in some places; suddenly in others; and more recently, by deliberate diversion in connection with the restoration of navigability. To

pursue the course proposed by the Choctaw and Chickasaw Nations against the defendants would require an inquiry concerning every segment of the river upon which leases had been executed by the state, not only to determine whether there had been a taking, and if so, the nature and extent, but also to determine whether the river was still flowing where it did when the tribal lands were allotted in severalty, and if not, how it got there. In view of the river's history of meandering it certainly cannot be assumed that every portion of its bed leased by the state belonged at the time to the Indian tribes and not to someone else. In the absence of an assertion to the contrary, therefore, the court is of the opinion that the burden in time and money and expense to the parties and the court is out of all proportion to any recovery reasonably to be expected. Assuming without discussion the unassailability of the Choctaw and Chickasaw Nations' position from a strictly legal view, practical considerations obviate the wisdom of following it. Nor do the equities of the matter favor the Choctaw and Chickasaw position. The mistake of Oklahoma and the other defendants in creating the situation that now exists is certainly no greater than the mistake of the tribes in not recognizing their ownership, or in not asserting it if they did. It is the opinion of the court that justice between the parties can best be served by refusing to go back beyond the present determination of ownership in fixing responsibility and liability for any taking of oil, gas, and other minerals, including sand and gravel, by the defendants. In this connection, it might be pointed out that these Indian Nations are by this view deprived of no greater legal right than persons convicted in violation of their constitutional rights but not now permitted to assert such defense.

If the defendant companies and individuals are not to be held accountable for their takings, if any, from the bed of the Arkansas prior to resolution of the question of ownership, it follows that they are not entitled to the return of moneys paid to the State of Oklahoma for leasehold or

other interests. The leases were acquired for a variety of reasons no doubt, but whatever the reason, in each instance it was obviously felt to warrant the payment of money. Regardless of the lack of ownership on the part of the State of Oklahoma of the property leased, the other defendants got what they bargained for. This would not be true, of course, if the court accepted the position of the Choctaw and Chickasaw Nations, but it does not. By protecting these defendants against being held accountable for any property belonging to the Indian tribes the court has at the same time, necessarily, precluded the return of sums expended by them for leaseholds from the State of Oklahoma. Their demand for the return of such funds, and the State of Oklahoma's concurrence in such demands, should therefore be denied.

This brings up the problem of what to do about the money received by the State of Oklahoma for leases on property it did not own. It might appear that if the legal relationship between the other defendants and the Indian Tribes is to start with determination by the court of ownership of the river bed, then the legal relationship between the defendant State of Oklahoma and the tribes ought to begin at the same time, which would leave the money in the hands of the State. But this result does not necessarily follow, and should not. The unwillingness of the court to cause the purchase price of the leaseholds to be returned is tied to the unwillingness of the court to permit the tribes to hold such purchasers responsible for anything taken under the leases up to this point. No such gain or loss is involved on the part of the State of Oklahoma; it gains nothing and loses nothing by the ruling. To permit it to keep such moneys, then, would be inequitable in the extreme—a matter which is plain on its face and requires no discussion. It is the opinion of the court, therefore, that all moneys received by the State of Oklahoma from the other defendants for leasehold interests in the bed of the Arkansas River heretofore claimed by the State were received

and have been held in trust for the Cherokee Nation and the Choctaw and Chickasaw Nations, and that the State should now be required to account therefor; and further, that all sums owing therefor but now held in suspense by any defendant should be accounted for to the court by such defendants.

At the several pretrial conferences held during the pendency of this litigation the parties thereto by counsel of record have advised the court that no oil or gas wells have been drilled on any part of the bed of the navigable portion of the Arkansas River between its high water banks; that no oil or gas leases have been executed except on that part of the bed of the Arkansas River below its confluence with the Canadian; and that no sand and gravel leases which represent any significant leasehold payments to the State have been executed on that part of the Arkansas River bed between the confluence with the Grand and the Canadian. The court is of the opinion, therefore, that no evidentiary hearing is required to determine the basis for distributing to the tribes the money which may be deposited with the registry of this court in accounting for leasehold payments made and owing; and that such moneys deposited with the court should be distributed one-half to the Cherokee Nation and one-half to the Choctaw and Chickasaw Nations.

All issues having been resolved by this and preceding pretrial orders, and nothing remaining to be determined upon an evidentiary hearing, judgment will be entered accordingly.

s/ Edwin Langley
DISTRICT JUDGE

APPENDIX B

The following published policy of the Commissioners of the Land Office was in effect at the time of the leases:

"POLICY COVERING COMPLETION OF SCHOOL LAND OIL AND GAS LEASES:

As a means of accomplishing an orderly closing of all Oil and Gas Lease sales, the Commissioners of the Land Office have found it necessary to adopt and publish the following policy requiring all Oil and Gas leases to be completed within the time specified in the published notice of sale, or an extension of such time allowed by the Commissioners for good and sufficient reasons. After the completion of the Oil and Gas Lease, should an examination of the abstract disclose defects in the State's title, the purchaser should immediately call such defects to the attention of the Legal Division of the Department. If, in the opinion of the Legal Division the title of the State to the Minerals lease cannot be defeated, the Commissioners will not institute suit to quiet the State's title; however, the Legal Division of the Land Office will cooperate with any lessee desiring to file a suit to quiet title of the leasehold and the Legal Department will assist such lessee in every way possible and furnish or cause to be furnished such information and records as may be available, and the State will join in the action as party plaintiff or defendant, if so requested, as in the judgment of the Legal Department is most advantageous, it being understood, however, that the Commissioners of the Land Office will not assume liability for any of the expense of the litigation.

In cases where the Legal Department determines that the State's title is questionable, suit will then be instituted upon the direction of the Commissioners to quiet the title, and his action will be carried to a final conclusion. If, upon completion of any litigation, it is determined that the State owns a lesser interest than advertised, the lessee shall have

the option of retaining the lease at the total bonus consideration bid, or upon delivery of a release accompanied by a proper request, a refund of the total bonus consideration and any delay rentals paid will be paid by the Commissioners.

/s/ Bill Sharp
Bill Sharp, Secretary
COMMISSIONERS OF THE LAND OFFICE"

In accordance with this policy, the State of Oklahoma instituted suit to quiet title to the lands in question on August 2, 1966, in Case 6143-Civil, U.S.D.C., Eastern District of Oklahoma. Further proceedings in that case were stayed by Pretrial Order dated September 25, 1967 pending resolution of the issues in the case now before this Court.